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No. 82-827

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF MINNESOTA,

Petitioner,

vs.

MARSHALL DONALD MURPHY,

Respondent.

WRIT OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a probation officer who uses the court's compulsory processes to elicit incriminatory statements from a probationer must first advise the probationer of the privilege against compelled self-incrimination in order for such statements to be admissible against the probationer in a criminal trial.

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IN THE

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No. 82-827

STATE OF MINNESOTA,

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vs.

MARSHALL DONALD MURPHY,

Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

On August 19, 1980, Marshall Donald Murphy (hereinafter respondent) pleaded guilty to a charge of false imprisonment. On September 22, 1980, he was sentenced to fifteen months imprisonment, execution of which was stayed three years with three years probation. Pet. App. C31.

Mara Widseth, of the Hennepin County Department of Court Services, was appointed to supervise the respondent's probation. As the respondent's probation officer, Widseth was acting as an "official representative of the [c]ourt." Pet. App. C33. The sentencing court ordered the respondent to be truthful to Widseth "in all matters" and to report to Widseth "as directed." Pet.App. C32,

34. Failure to comply with either of those orders would be grounds to revoke the respondent's probation. Pet.App. C13, 32.

As a special condition of probation, the respondent was ordered to pursue treatment at Alpha House. Pet.App. C32. On or about July 3, 1981, Widseth learned that the respondent failed to complete the treatment program. Pet. App. C7, 8. On July 14, 1981, Widseth wrote the respondent a letter requesting that he contact her. The letter stated, "Failure to do so will result in an immediate request for a warrant." Pet.App. C35. On July 21, 1981, the respondent met with Widseth. Because the respondent was apparently doing well without treatment, Widseth decided not to seek revocation of the respondent's probation. Pet.App. C14. Widseth retained the authority to require the respondent to resume treatment. Pet.App. B3, C14, 15.

On September 11, 1981, the respondent met again with Widseth at the probation office. Pet.App. C8. This meeting was one of several monthly meetings which the respondent arranged by calling Widseth for an appointment. Pet.App. C5. After this meeting, the respondent was under no obligation to arrange another meeting until mid-October 1981. Pet. App. B4.

On September 22, 1981, Widseth was told by a psychologist from Alpha House that, during treatment, the respondent said that several years earlier he had committed a rape-murder and that the police had not arrested him because of a lack of evidence. Pet.App. C2, 9, 15.

On September 24, 1981, Widseth met with her supervisor to discuss what to do with the new information. Pet.App. C15. They decided that Widseth must report

the information to the police and that she should tell the respondent about that decision. Pet.App. C16. On that same day, Widseth wrote the respondent the following letter:

September 24, 1981

Mr. Marshall Murphy

[address]

Dear Marshall:

To further discuss a treatment plan for the remainder of your probation, I am requesting that you contact me upon receipt of this letter to set an appointment.

Mara Widseth
Probation Officer

Pet.App. C36

On September 28, 1981, in response to Widseth's letter, the respondent met with her at her office. Widseth "confronted" the respondent with her information from Alpha House about the murder. Pet.App. C9. She told the respondent that his conduct during the murder was "strongly related behaviorally" to the conduct underlying his false imprisonment charge "and that that needed to be dealt with [by] continued treatment." Pet.App. C9. The respondent was "shocked" that Widseth knew about the murder. Pet.App. C26. He expressed anger because he thought that everything said in treatment was confidential. Pet.App. C16, 21. The respondent then said that he "felt like calling an attorney." Pet.App. A3, C16, 21. Widseth told the respondent that "he would have to contact an attorney outside [the] office" because her "main concern at this time" was the relationship between the two offenses

and the respondent's need for further treatment. Pet.App. B5, C16.

The respondent said that the false imprisonment and the murder were not related because he was innocent of the false imprisonment charge and that at the time of the murder he had been using drugs. Pet.App. C17, 18. After discussing the false imprisonment charge, the respondent told Widseth about the murder. Pet.App. C10, 11, 18.

It was not until after the respondent described the murder that Widseth told him about her intent to report her information to the police. When questioned by the trial court, the probation officer testified:

> The Court: [ ] So that I understand this fully, when you sent for the [respondent] and asked to speak to him, you knew, did you not, that you were going to speak to him on the topic of information you heard about the possible rape-murder?
>
> The Witness: Yes.
>
> The Court: And do I understand from your testimony that you also knew in advance that you were going to pass the information on to the police?
>
> The Witness: Yes.
>
> The Court: Did you advise him in advance of that fact before questioning him?
>
> The Witness: No, I did not.
>
> Pet.App. C24

After telling the respondent that she was going to the police, Widseth encouraged the respondent to turn himself in to the police. At the respondent's request, Widseth gave him "permission" to leave the probation office and think about it. Pet.App. B5, C18. The respondent left the probation office and contacted a lawyer. Pet.App. C28.

On September 30, 1981, the respondent called Widseth and told her that he would not turn himself in to the police. Pet.App. B5, C28.

On October 2, 1981, the respondent was arrested on a probation violation warrant alleging his failure to complete treatment and on a warrant charging him with murder in the second degree. Pet.App. B5, C14, 15. The respondent was subsequently indicted for murder in the first degree.

At a pretrial hearing, the respondent moved to suppress his statements made to Widseth. The trial court denied the motion, ruling that although it would have been the "better practice" to have advised the respondent of the privilege against self-incrimination, such an advisory was not constitutionally required because the respondent was not in custody within the meaning of *Miranda*. Pet.App. B6. The trial court also held that the respondent's statements were voluntary. Pet.App. B14.

At the pretrial hearing, respondent argued that his request for a lawyer constituted an invocation of the privilege against self-incrimination. Pet.App. B6. In its memorandum, the trial court did not specifically address that issue. In the statement of facts, the trial court noted that "[b]oth the probation officer and [the respondent] testified that [the respondent] spoke of obtaining an attorney." Pet. App. B5. The trial court addressed the legal effect of the respondent's request for a lawyer only in its analysis of whether the respondent's statements were voluntary. The trial court said:

> [The respondent] now claims that he asserted a right to talk to an attorney, and whatever his real intent may have been, we are persuaded by the proba-

tion officer's testimony that he did not express that desire in any context other than a civil suit for breach of confidentiality. Pet.App. B13, 14

The trial court certified the suppression issues to the Minnesota Supreme Court. Pet.App. B17. The pretrial hearing transcript revealed that the probation officer did not testify that the respondent expressed his desire for a lawyer in terms of a civil suit. Pet.App. C20, 21.

The Minnesota Supreme Court reversed. The court held that because the respondent was under court order to meet with his probation officer and answer her questions truthfully, and because the probation officer had substantial reason to believe that the answers to her questions would be incriminatory, the respondent could rely on the privilege against self-incrimination to bar at trial the admission of his statements to the probation officer. The court also held that, as a matter of due process, the probation officer was required to advise the respondent of his privilege against self-incrimination before questioning him about the murder. Pet.App. A10. The court credited the respondent's testimony: (1) that he did not know he had a right to consult with a lawyer or refuse to answer the probation officer's questions; and (2) that, based on the probation officer's comments, he thought the only reason for discussing the murder was to determine whether he needed further treatment. Pet.App. A4.

The Minnesota Supreme Court stated that it need not decide the issue of whether respondent's request for a lawyer constituted an invocation of the privilege against self-incrimination. Pet.App. A9. In its recitation of the facts, the court stated that the respondent told the probation

officer "that he felt his confidence had been breached by the disclosure and that he felt like calling an attorney." Pet.App. A3.

The Minnesota Supreme Court remanded the case to the trial court. On the respondent's motion, the trial court dismissed the indictment for insufficient evidence. The trial court stayed the dismissal order pending a decision by this Court. Pet.App. D3.

SUMMARY OF ARGUMENT

I.

A government official must advise an individual of the privilege against compelled self-incrimination in order to introduce the individual's statements at a criminal trial when the following three factors exist: (1) the individual is compelled, within the meaning of the Self-Incrimination Clause, to speak to the government official; (2) the government official has substantial reason to believe that the answers to his questions will incriminate the individual; and (3) the questioning is conducted in the absence of impartial observers or without providing an opportunity for the individual to consult with a lawyer. *Miranda v. Arizona*, 384 U.S. 436 (1966).

If an interrogation is conducted by a judicial officer who has legal authority to compel truthful answers to questions, then the Self-Incrimination Clause governs regardless of whether the interrogation is custodial. *Michigan v. Tucker*, 417 U.S. 433, 439-40 (1974). See e.g., *In Re Gault*, 387 U.S. 1 (1967) (juvenile proceedings); *McCarthy v. Arndstein*, 266 U.S. 34 (1924) (civil proceedings); *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (grand

jury proceedings). The legal power to order an individual to report to a designated place and answer questions truthfully is "genuine compulsion." *Michigan v. Tucker, supra,* at 440.

The rule requiring an individual to assert the privilege in order to invoke it is based on the assumption that the government generally does not know whether its compulsory processes will elicit incriminatory testimony. *Garner v. United States,* 424 U.S. 648, 655 (1976). If the rule were otherwise, the government would often unintentionally immunize a witness' compulsory testimony. *United States v. Monia,* 317 U.S. 425, 442 (1943) (Frankfurter, J., dissenting). If the government has substantial reason to believe that its compulsory processes will elicit incriminatory testimony, then the rationale for the rule does not exist and the rule has not been applied. *Garner, supra,* at 657-61. See also, *Rhode Island v. Innis,* 446 U.S. 291 (1980).

This Court has only applied the rule requiring an individual to assert the privilege in order to invoke it in cases where the individual was either advised of the privilege against self-incrimination, e.g., *Fare v. Michael C.,* 442 U.S. 707 (1979), or otherwise had some opportunity to consult with a lawyer before deciding whether to make the compulsory disclosure. *Garner v. United States,* 424 U.S. 648, 658 (1976) (filing a tax return); *United States v. Kordel,* 397 U.S. 1, 9-10 (1970) (answering an interrogatory in civil lawsuit). The ability to assert the privilege can often be dependent upon having access to legal advice. *Maness v. Meyers,* 419 U.S. 449 (1975).

The privilege against self-incrimination is self-executing under the facts of this case. First, the probation officer

was an "official representative of the [c]ourt" who had the legal authority to compel the respondent's presence in her office and to compel the respondent to give truthful answers to her questions. Pet.App. A10, C31-35. Second, ". . . the probation officer knew that the information she was requesting would be incriminatory, and further that she . . . intend[ed] to turn that information over to the police." Pet.App. B13. Third, unlike a witness served with a grand jury subpoena, the respondent had no idea he was going to be interrogated about a criminal conduct and, therefore, he had no opportunity to consult with a lawyer before going to the probation office.

Once inside the probation office there were no impartial observers to guard against the kind of menacing interrogation techniques which concerned this Court in *Miranda*. The probation officer took advantage of the opportunity to use those techniques. She "confronted" the respondent with her knowledge of the murder. Pet.App. C9. Although she at all times intended to report the respondent's statements to the police, she told the respondent only that her concern was with further treatment. Pet.App. C9, 16, 17, 24. When the respondent said he felt like calling a lawyer, the probation officer refused to allow him to do so. She repeated that her "main concern" was with further treatment. Pet.App. C16. This Court has never required an individual to assert the privilege under facts comparable to these.

The Minnesota Supreme Court decision serves the best interests of the probation system without undermining the legitimate needs of law enforcement.

Generally, if a probation officer obtains information concerning criminal conduct by a probationer, the proba-

tion officer can give that information to a law enforcement agency to be handled like any other criminal investigation. If the court's compulsory processes are needed to further investigate the alleged criminal conduct, then the grand jury system is available.

The Administrative Office of the United States Courts instructs federal probation officers to refrain from testifying against probationers in criminal trials. See Note 14, *infra*. Under the federal probation system and the probation system envisioned by the Minnesota Supreme Court, when a probation officer asks a probationer about alleged criminal conduct, the answers to those questions will only be used to determine whether to further regulate or revoke probation. A Fifth Amendment warning is not required for that purpose. Pet.App. A7-8. It will only be in those rare cases when the probation officer wants to preserve the evidentiary value of the probationer's statements that the probation officer must advise the probationer of the privilege against self-incrimination.

The trust relationship in the probation system is undermined when statements made in confidence to a probation officer are introduced against a probationer in a criminal trial. The Minnesota Supreme Court decision protects that trust relationship without impairing the proper functioning of law enforcement.

II.

An individual on probation may legitimately assert the privilege against self-incrimination in order to protect himself against further criminal prosecution. Cf. *Roberts v. United States*, 445 U.S. 552 (1980).

The Self-Incrimination Clause limits the power of the government to use its compulsory processes to obtain testimony from an individual when the government has notice of two things: (1) that the testimony it seeks will incriminate the individual; and (2) that the individual objects to the government seeking that testimony. *Garner v. United States*, 424 U.S. 648, 655 (1976). The individual's objection can be made "in any language that a [government official] may reasonably be expected to understand as an attempt to invoke the privilege. . . ." *Quinn v. United States*, 349 U.S. 155, 162-63 (1955). If a government official knows that his compulsory processes are going to elicit incriminatory testimony, then the government official cannot arbitrarily deny an individual's request to consult with a lawyer. See, *United States v. Mandujano*, 425 U.S. 564, 582 (1976) (Burger, C.J., plurality); *Maness v. Meyers*, 419 U.S. 449, 472 (1975) (Stewart, J., concurring). See also, *Fare v. Michael C.*, 442 U.S. 707, 719 (1979).

In this case the probation officer knew that the answers to her questions would be incriminatory and she knew the respondent wanted to call a lawyer before talking about the murder. The probation officer's subsequent interrogation exceeded the limits of her constitutional authority.

ARGUMENT

I.

A PROBATION OFFICER WHO USES THE COURT'S COMPULSORY PROCESSES TO ELICIT INCRIMINATORY STATEMENTS FROM A PROBATIONER MUST FIRST ADVISE THE PROBATIONER OF THE PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION IN ORDER FOR SUCH STATEMENTS TO BE ADMISSIBLE AGAINST THE PROBATIONER IN A CRIMINAL TRIAL.

A. An Individual Need Not Assert The Privilege In Order To Invoke It If He Is Interrogated By A Government Official Pursuant To A Compulsory Process And The Interrogation Occurs In The Absence Of Impartial Observers Or Without Providing The Individual An Opportunity To Consult With A Lawyer.

This Court has said that a government official must advise an individual of the privilege against self-incrimination prior to interrogation when the following three factors exist: (1) the individual is under compulsion within the meaning of the Self-Incrimination Clause to speak to the government official; (2) the government official has substantial reason to believe that the answers to his questions will incriminate the individual; and (3) the questioning is conducted in the absence of impartial observers or without providing an opportunity for the individual to consult with a lawyer. If these three elements exists, then an individual need not have asserted the privilege at the

time of his interrogation in order to invoke the privilege at his subsequent criminal trial. *Miranda v. Arizona*, 384 U.S. 436 (1966).

1. Prior to *Miranda*, the principle issue in cases involving confessions to police officers "was not whether the individual waived the privilege against compulsory self-incrimination but simply whether his statement was 'voluntary'." *Michigan v. Tucker*, 417 U.S. 433, 441 (1974). The rationale used to exclude a Self-Incrimination Clause analysis from these cases was that police officers did not have the legal authority to compel answers to questions. See, Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L.Rev. 59 (1966). In *Miranda*, the Court applied the Self-Incrimination Clause to custodial interrogations by police officers reasoning that in those situations there are "inherently compelling pressures which work to . . . compel [the individual] to speak where he would not otherwise do so freely." 384 U.S. at 467.

The concept of custodial interrogation is not limited to the police station, *Orozco v. Texas*, 394 U.S. 324 (1969); nor does questioning at a police station necessarily constitute custodial interrogation. *Oregon v. Mathiason*, 429 U.S. 492 (1977). The test for custody is whether the individual's "freedom of action is curtailed in any significant way. . . ." *Miranda*, 384 U.S. at 467.

If an interrogation is conducted by a judicial officer who, in contrast to a police officer, has the legal authority to compel truthful answers to questions, then the Self-Incrimination Clause governs regardless of whether the interrogation was custodial. *Michigan v. Tucker*, 417 U.S.

433, 439-40 (1974); *Miranda v. Arizona*, 384 U.S. 436, 526-27 (1966) (White, J., dissenting). *Wood v. United States*, 128 F.2d 265, 268 (D.C. Cir. 1942) (opinion of Judge Rutledge). The Self-Incrimination Clause has been held applicable to grand jury proceedings, *Counselman v. Hitchcock*, 142 U.S. 547 (1892); to civil proceedings, *McCarthy v. Arndstein*, 266 U.S. 34 (1924); and to juvenile proceedings, *In Re Gault*, 387 U.S. 1 (1967). See also, *Malloy v. Hogan*, 378 U.S. 1 (1964); *Watkins v. United States*, 354 U.S. 178 (1957). When the questioning of an individual has occurred in these kinds of proceedings, then "there has been [a] genuine compulsion of testimony. . . ." *Michigan v. Tucker, supra*, at 440.

2. In order for the government to function, it must be able to compel testimony from individuals. The burden is generally on the individual to assert the privilege against compelled self-incrimination in order to invoke it. This rule is based on the assumption that unless an individual asserts the privilege, the government will not know whether its compulsory processes are going to elicit testimony which will be incriminatory in nature. *Garner v. United States*, 424 U.S. 648, 655 (1976).[1] If the burden

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[1]The Solicitor General cites *Garner* to support the proposition that the reason for requiring an individual to assert the privilege is because the government can ordinarily assume that an individual's response to a compulsory process is the result of a voluntary choice. Brief for the United States, P. 21. That is not what the Court in *Garner* assumed. The Court said:

> Unless a witness objects, a government ordinarily may assume that its compulsory processes are not eliciting testimony that he deems to be incriminating. *Only the witness knows whether the apparently innocent disclosure sought may incriminate him*, and the burden appropriately lies with him to make a timely assertion of the privilege. 424 U.S. at 655 (Emphasis added)

were not on the individual to assert the privilege, then the government would often unintentionally immunize an individual's compulsory testimony. *United States v. Monia*, 317 U.S. 425, 442 (1943) (Frankfurter, J., dissenting). See, Westen and Mandell, *To Talk, To Balk, or To Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response"*, 19 Am.Cr.L.Rev. 521 (1982) (hereinafter Westen and Mandell).

If the government has substantial reason to believe that its compulsory processes will elicit incriminatory information, then the government cannot complain that it unknowingly immunized a person's compulsory testimony. Under these circumstances the rule requiring an individual to assert the privilege has not been applied. See e.g., *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Miranda v. Arizona*, 384 U.S. 436 (1966). See also, *Rhode Island v. Innis*, 446 U.S. 291 (1980).

3. A central concern of the Court in *Miranda* was the ability of police officers to use intimidating and deceptive interrogation techniques in order to impair a suspect's ability to assert the privilege against self-imcrimination. *Miranda*, 384 U.S. at 448-55. The Court recognized that these interrogation techniques cannot occur during judicial investigations when the questioning takes place in the presence of impartial observers. *Miranda*, 384 U.S. at 461. See, *United States v. Mandujano*, 425 U.S. 564, 579-80 (1976) (Burger, C.J., plurality).

Similarly, these interrogation techniques are not likely to occur if the individual has an opportunity to consult with a lawyer prior to the interrogation. The rule requiring an individual to assert the privilege in order to invoke

it has been applied by this Court only when the individual was either advised of his privilege against self-incrimination, e.g., *Fare v. Michael C.*, 442 U.S. 707 (1979); or otherwise had time to consult with a lawyer before deciding whether to make the compulsory disclosure. *Garner v. United States*, 424 U.S. 648, 658 (1976) ("a taxpayer . . . can complete his return at leisure and with legal assistance . . ."). *United States v. Kordel*, 397 U.S. 1, 9-10 (1970) ("The respondents do not suggest that Feldten, who answered the interrogatories on behalf of the corporation, did so while unrepresented by counsel or without appreciation of the possible consequences."); See also, *Roberts v. United States*, 445 U.S. 552, 561 (1980) ("petitioner was represented by counsel who was fully apprised —as was petitioner—that the extent of petitioner's cooperation could be expected to affect his sentence"); *United States ex. rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 113 (1927) (refusal to testify at a deportation hearing without asserting the privilege was based upon advice from counsel.)

If a judicial investigation does not allow time for an individual to consult with a lawyer or if the judicial investigation occurs in the absence of impartial observers, then the intimidating and deceptive interrogation techniques which concerned the Court in *Miranda* are available to any government official who knowingly uses the court's compulsory processes to incriminate an individual. **Under these circumstances, the government official must advise the individual of the privilege against self-incrimination. If the government official fails to do so, then the individual may make the compulsory disclosure without forfeiting his right to invoke the privilege at a subsequent criminal trial.**

B. The Respondent Was Compelled Within The Meaning Of The Self-Incrimination Clause To Answer His Probation Officer's Questions.

The power of a probation officer is qualitatively different from the power of a police officer. It is no less compelling. In *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); the Court described the power of probation officers as follows:

> [T]he probation officer acts as an extension of the judiciary's authority to set the conditions under which particular individuals will lead their lives and of the executive's authority to *coerce obedience* to those conditions. From the perspective of the probationer, his *probation officer may personify the State's sovereign powers*. . . . 454 U.S. at 447 (Emphasis added)

The forces which compel a probationer to talk to a probation officer arise from the fear of a legal sanction if the probationer does not talk. A probation officer is ". . . *armed* with the power to recommend or even to declare revocation." *Gagnon v. Scarpelli*, 411 U.S. 778, 784 (1973) (Emphasis added).[2] The probation officer's power to recommend probation revocation, along with the probationer's duty to cooperate with the probation officer, implicitly create the inference that legal sanctions are likely if the probationer fails to respond when questioned. The Court in *United States v. Deaton*, 468 F.2d 541, 544 (5th Cir. 1972), said, "A parolee is under heavy psychological pres-

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[2] "While it is the judge who actually revokes probation, it is the probation officer who initiates the revocation action and largely controls it." Zajkoski, *Exposing the Quasi-Judicial Role of the Probation Officer*, 37 Fed.Prob. 9, 12 (Sept. 1973).

sure to answer inquiries made by his parole officer, perhaps even greater than when the interrogation is by an enforcement officer." The fear of a legal sanction for a refusal to submit to questioning has historically been recognized as the essence of compulsion. *Michigan v. Tucker*, 417 U.S. 433, 440 (1974).[8]

In addition to the power to recommend probation revocation, a probation officer has the power to detain a probationer in the probation office. In this case, the respondent was ordered by the court to report to his probation officer "as directed." Pet.App. C32. The respondent testified that he believed that if he had walked out of the probation office without the probation officer's permission, then his probation would have been revoked. Pet.App. C26. The probation officer agreed with the statement that the respondent left her office with her "permission." Pet. App. C18. The Solicitor General characterized the respondent's leaving the probation office as follows: "Widseth *allowed* respondent to leave her office. . . ." Brief for

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[8]The Solicitor General argues that a general requirement on a probationer to be cooperative with his probation officer does not amount to compulsion unless the probation officer gives a probationer ". . . some reason to believe that he was being uncooperative in a way that violated the conditions of his probation. . . . ." Brief for the United States, P. 19. At the time the respondent discussed the murder with his probation officer, the respondent was in violation of his probation for having failed to complete a treatment program. Pet. App. C14-15. The probation officer told the respondent that she wanted to talk about the murder because she believed he needed to go back to treatment. The respondent had every reason to believe that if he was going to be uncooperative with respect to discussing his need for treatment then there would be a probation violation for having failed to complete treatment. According to the Solicitor General's own standards, the respondent was compelled within the meaning of the Self-Incrimination Clause to make incriminatory statements.

the United States, P. 4 (Emphasis added). If at any time during the interrogation the respondent had walked out of the probation office without the probation officer's permission, then, under state law, the probation officer could have caused the respondent to have been "taken into immediate custody" and held without bail pending a revocation hearing. Minn. Stat. §609.14, Subd. 1. See, Pet. App. D4. "Viewed from the eyes of a probationer, the [probation] office represents a power that can, and does, limit his freedom." Arcaya, *The Multiple Realities Inherent in Probation Counseling*, 37 Fed.Prob. 58, 59 (Dec. 1973).

The legal power of a probation officer to order a probationer to report to a designated place and remain there to answer questions truthfully is sufficient to bring this case within the protections of the Self-Incrimination Clause. This case does not turn on whether the door to the probation office was locked.

C. The Probation Officer Had Substantial Reason To Believe That The Answers To Her Questions Would Incriminate The Respondent.

At the time the probation officer questioned the respondent about the murder, the probation officer knew that the answers to her questions would be incriminatory. The trial court found: "[T]here is no question that the probation officer knew that the information she was requesting would be incriminating, and further that she was intending to turn the information over to the police." Pet.App. B13. Under these facts, there is no legitimate state interest in requiring the respondent to assert the privilege in order to invoke it. See, Pages 14-15, *supra*.

The petitioner argues that the strength and content of the probation officer's suspicions are irrelevant to a "Fifth Amendment" analysis. Petitioner's Brief on the Merits, P. 26-29. See also, Brief for the United States, P. 26. Reliance for this position is placed on *Beckwith v. United States*, 425 U.S. 341 (1976).

In *Beckwith*, the issue before the Court was whether the principles of *Miranda* should apply during a non-custodial police interrogation simply because the investigation had focused on the accused. 425 U.S. at 345. The Court held that it is only custodial police interrogation which triggers the Self-Incrimination Clause and that non-custodial police interrogation is governed by the Due Process Clause regardless of the strength or content of the police suspicions. 425 U.S. at 346-48.

Beckwith is distinguishable from this case. This case is governed by the Self-Incrimination Clause regardless of whether the respondent was in custody. In cases governed by the Self-Incrimination Clause, the strength and content of the government official's suspicions are highly relevant in determining the admissibility of statements made to that official. See, *Rhode Island v. Innis*, 446 U.S. 291, 301-02 n. 7 (1980).[4]

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[4]It is no answer to say that the probation officer was really concerned with respondent's need for further treatment. Petitioner's Brief on the Merits, P. 28. As stated by Professor Kamisar:

> . . . so long as the police conduct is likely to elicit incriminating statements and thus endanger the privilege, it is police "interrogation" *regardless of its primary purpose or motivation*, and that if it otherwise qualifies as "interrogation" *it does not become something else* because the interrogator's main purpose is [something other] than the procuring of incriminating statements, even though self-incrimination may be foreseen as a windfall.

The Minnesota Supreme Court's emphasis on the probation officer's knowledge and intent led to a result in this case which is consistent with the decisions of other courts in similar cases.

In cases where the probation officer questioned the probationer in police custody, courts have uniformly held that absent *Miranda* warnings, statements made by the probationer to the probation officer cannot be used against the probationer in his criminal trial.[8] When a government official questions someone whom the police have just arrested, it is presumed that the government official has substantial reason to believe he will elicit incriminatory information. *Garner v. United States*, 424 U.S. 648, 657 (1976).

In cases where the probation officer's questioning of a probationer was not conducted in police custody, the courts' decisions have turned on whether the probation officer was attempting to elicit incriminatory information. In

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Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does it Matter?*, 67 Geo.L.J. 1, 9 (1978) (Emphasis in original). See also, White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 Mich.L.Rev. 1209, 1233 n. 154 (1980).

The Solicitor General does not dispute that the probation officer interrogated the respondent within the meaning of *Rhode Island v. Innis, supra.* Brief for the United States, P. 10 n.3.

[8]See e.g., *United States v. Deaton*, 468 F.2d 541 (5th Cir. 1972); *United States v. Steele*, 419 F.Supp. 1385 (W.D.Pa. 1976); *People v. Diesing*, 67 Ill.App.3d 109, 384 N.E.2d 575 (1978); *State ex. rel. Struzik v. Department of Health and Social Services*, 77 Wis.2d 216, 252 N.W.2d 660 (1977); *State v. Magby*, 113 Ariz. 345, 554 P.2d 1272 (1976); *State v. Gallagher*, 38 Ohio St.2d 291, 313 N.E.2d 396 (1974), remanded, 425 U.S. 257, on remand, 46 Ohio St.2d 225, 348 N.E.2d 336 (1976); *State v. Williams*, 486 S.W.2d 468 (Mo. 1972); *State v. Lekas*, 201 Kan. 579, 442 P.2d 11 (1968).

People v. Parker, 82 A.D.2d 661 (App.Div. 1981), aff'd., 57 N.Y.2d 815 (1982), the probation officer had reason to believe that statements he was eliciting from the probationer would lead to a criminal prosecution against the probationer. The court suppressed those statements at the probationer's criminal trial.[6] In *State v. Roberts*, 14 Wash.App. 727, 544 P.2d 754 (1976), the probationer telephoned his probation officer and volunteered incriminatory information. The court held that the probationer's statements were admissible at trial. In *State v. Fields*, 291 Or. 872, 635 P.2d 376 (1981), the probation officer was attempting to incriminate the probationer in the presence of a police officer. The probationer was told that he was not under arrest and that he did not have to answer any questions. With one judge dissenting, the court held that probationer's statements were admissible at trial.

Taken together, these cases stand for the principle that when a probation officer has substantial reason to believe that the answers to his questions will be incriminatory, then the resulting statements are not admissible in the probationer's criminal trial absent a knowing waiver of the privilege against self-incrimination.[7] These cases are con-

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[6]This decision reversed *People v. Parker*, 101 Misc.2d 800, 421 N.Y.S.2d 561 (1979), which the trial court in this case relied on extensively in its memorandum. Pet.App. B9-11. At the time the trial court wrote its memorandum, both trial counsel and the trial court failed to notice that *Parker* had been reversed.

[7]The federal cases cited by the Solicitor General fit within this framework. See, Brief for the United States, P. 15 n. 9. In *United States v. Miller*, 543 F.2d 713 (10th Cir. 1981); and *United States v. Holmes*, 594 F.2d 1167 (8th Cir.), cert. denied, 444 U.S. 873 (1979), there was no indication that the probation officers were attempting to elicit incriminatory information with respect to a new criminal offense. *United States v. Rea*, 678 F.2d 382 (2d Cir. 1982); and

sistent with the decision of the Minnesota Supreme Court.

D. The Respondent Had No Opportunity To Consult With A Lawyer Before Making The Compulsory Disclosure.

During their monthly meetings, the respondent and the probation officer would discuss the respondent's "life situation . . ., his progress at Alpha House . . ., his employment . [and his] personal relationships." Pet.App. C6. After receiving the probation officer's letter stating that she wanted to talk about further treatment for the remainder of his probation, the respondent had no reason to believe that he was going to the probation office to be interrogated about a murder. Unlike a witness who is served with a subpoena to testify before a grand jury, the respondent had no reason to consult with a lawyer before going to the probation office.

Once inside the probation office, the probation officer "confronted" the respondent with her knowledge of the murder. Pet.App. C9. The respondent was "shocked."Pet. Pet.App. C26. The sentencing judge had ordered him to cooperate with his probation officer or face revocation,[8]

United States v. Delago, 397 F.Supp. 708 (S.D.N.Y. 1974), concerned only the admissibility of statements in a probation revocation hearing. The Minnesota Supreme Court's holding is limited to the admissibility of statements in a criminal trial.

[8]This Court in dictum has referred to *Garrity v. New Jersey*, 385 U.S. 493 (1967), as a case involving an automatic penalty for asserting the privilege. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Garner v. United States*, 424 U.S. 648, 661 (1976). However, the Court in *Garrity* did not strike down an automatic penalty statute. 385 U.S. at 496. Compare, *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Sanitation Men v.*

but he knew that if he cooperated with his probation officer now, he would implicate himself in a murder. The probation officer was telling him that the purpose of talking about the murder was to determine if he had to go back to treatment, but he knew that the penalty for murder is prison. He believed that everything he said in treatment was confidential, but now it appeared too late to remain silent because his private statements had already been made public. See, *Brown v. Illinois*, 422 U.S. 590, 605 n.

Sanitation Commissioner, 392 U.S. 280 (1968); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Spevak v. Klein*, 385 U.S. 511 (1967). Nor was the police officer in *Garrity* told that the penalty for asserting the privilege would be automatic. The police officer was told only that he "may be subjected to a proceeding to have [him] removed from office" if he asserted the privilege. 385 U.S. at 504 n. 1.

If the taxpayer in *Garner* had asserted the privilege, then he would have been subject to a criminal prosecution which could have resulted in the loss of his liberty. In *Garner*, the Court held that the taxpayer forfeited the privilege by failing to assert it on his tax return. In *Garrity*, the Court held that the police officer did not forfeit the privilege by testifying at the attorney general's investigation. The distinction is that the taxpayer in *Garner* had ample opportunity to talk to a lawyer before filing his tax return, whereas the police officer in *Garrity* was told about potential legal proceedings immediately prior to the time he was to testify and without the presence of a lawyer. Having no opportunity to intelligently reflect on his choices, the police officer did not forfeit the privilege by making the disclosure. See, Westen and Mandell, 19 Am.Cr.L.Rev. 521, 537-38 (1982).

In contrast to *Garner* and *Garrity*, this case does involve an automatic penalty for asserting the privilege. The petitioner concedes that if the respondent had asserted the privilege, the respondent would have faced a probation revocation hearing. Petitioner's Brief on the Merits, P. 38-40. The probation officer could have caused the respondent to "be taken into immediate custody" and held without bail pending the revocation hearing. Minn. Stat. §609.14, Subd. 1. See, Pet.App. D4. Unlike the taxpayer in *Garner*, who was entitled to bail in the event of a criminal prosecution, the respondent was facing an automatic loss of liberty if he asserted the privilege.

12 (1975). He told his probation officer that he felt like calling a lawyer, but the probation officer would not allow him to do that.[9] At this point, the respondent found himself in "an unfamiliar atmosphere" and subject to "menacing . . . interrogation procedures." Miranda, 384 U.S. at 457.

One of the menacing interrogation techniques referred to

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[9]The trial court found that the probation officer told the respondent that "he would have to contact an attorney outside the office." Pet.App. B5. Based on the probation officer's response, it is clear that the respondent expressed to her that he wanted to call an attorney before continuing with the conversation. The petitioner has never claimed that the probation officer did not know that the respondent wanted to call a lawyer.

The only conceivable factual dispute concerns what the respondent wanted to talk to a lawyer about. The trial court made no factual finding with respect to what the respondent's "real intent" was when he asked for a lawyer. Pet.App. B13. The trial court simply said that he was "persuaded by the probation officer's testimony" that the respondent's request for a lawyer was made solely in the context of "a civil suit" for the breach of confidentiality. Pet.App. B14. It should now be undisputed that the probation officer never testified about a "civil suit." Pet.App. C20-21; Pet.App. A3. Having made no factual finding with respect to the respondent's real intent when he asked for an attorney, and having erroneously stated that the probation officer testified about a civil suit, it is simply untrue to say, "[t]he trial court found . . . respondent's comment [about an attorney] related only to what respondent considered to be Alpha House's breach of confidentiality, not Widseth's questioning." Brief for the United States, P. 22 n. 13.

There is no significant distinction between wanting to talk to a lawyer about a perceived breach in confidentiality and wanting to talk to a lawyer about Widseth's questioning. If the respondent had been allowed to call a lawyer, he undoubtedly would have told the lawyer about the *facts* of the case; those being a disclosure by the treatment facility to the probation officer and the probation officer's subsequent questions. It is incredible to suggest that the respondent wanted to talk to a lawyer about one aspect of his case but that he did not want to talk to a lawyer about the other.

in *Miranda* was for the interrogator to posit the guilt of the accused as a known fact and then to focus the interrogation on why the act was done. *Miranda*, 384 U.S. at 450. That is exactly what the probation officer did to the respondent. The probation officer posited the respondent's guilt when she "confronted" him with her knowledge of the murder. Pet.App. C9. She then focused the interrogation on treatment and the behavioral relationship between the murder and the false imprisonment. Pet.App. C9, 16-17. During this entire episode, the probation officer intended to report the respondent to the police. Pet. App. C24.[10]

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[10]The Minnesota Supreme Court's reference to due process indicates the court believed that the probation officer's conduct was deceptive. Pet.App. A10. In *United States v. Kordel*, 397 U.S. 1 (1970), the government obtained admissions from the defendant during discovery in a civil case and later used those admissions against the defendant in a criminal case. The Court said that there was no due process violation because during the civil proceeding the government advised the defendant that a criminal prosecution was being "contemplate[d]." 397 U.S. at 12. Presumably, the Minnesota Supreme Court referred to due process as basis for a warning requirement because the probation officer was contemplating a criminal prosecution while purporting to use the court's compulsory processes for some other purpose.

The petitioner notes that at some point the respondent told the probation officer that he was aware of her duty to report him to the police. Petitioner's Brief on the Merits, P. 45. The respondent made that statement *after* the probation officer told him that it was her obligation to report "the information" to the police. According to the probation officer, the respondent replied, "he understood that I would need to do that, and . . . he felt I really cared about him because I could have just picked up the phone and dialed the police." Pet.App. C21.

That statement by the respondent to his probation officer underscores the fact that the respondent did not understand his legal rights. According to applicable confidentiality laws, the probation officer was prohibited from telling the police about the information

A probation interview which focuses on a treatment plan is not viewed by a probationer as a "phase of the adversary system." *Miranda*, 384 U.S. at 469.[11] During probation interviews, "concern for the *client* dominates [the probation officer's] professional attitude." *Gagnon v. Scarpelli*, 411 U.S. 778, 783-84 (1973) (Emphasis added), quoting, F. Remington, D. Newman, E. Kimball, M. Melli and H. Goldstein, Criminal Justice Administration, Ma-

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she received from the treatment facility. See Note 15, *infra*. She needed to have the respondent talk about the murder in her presence before she had something which she could report to the police.

In determining what the respondent knew while he talked about the murder, the Minnesota Supreme Court did not refer to statements made by the respondent after he talked about the murder when the probation officer first told him about her intent to go to the police. The court credited the respondent's testimony that he was unaware of his Fifth Amendment rights at the time he talked about the murder and that he thought he was only talking about his need for further treatment as part of his probation. Pet.App. A.4.

[11]In *Estelle v. Smith*, 451 U.S. 454 (1981), the Court grounded the *Miranda* warning requirement on the custodial nature of the court ordered psychiatric examination. *Id.* at 467. However, the Court's underlying concern appears to have been that, absent a *Miranda* warning, the non-adversarial nature of a court ordered competency examination would lead a person to believe that statements made during the compulsory examination would not be used in a criminal trial. *Id.* at 468. Federal courts have expressed a similar concern regardless of whether the court ordered psychiatric examination took place in a custodial setting. *Gibson v. Zahradnick*, 581 F.2d 75, 79 (4th Cir.), cert. denied, 439 U.S. 996 (1978); *United States v. Reifsteck*, 535 F.2d 1030, 1034 n.1 (8th Cir. 1976); *United States v. Alvarez*, 519 F.2d 1036, 1041-42 (3d Cir. 1975); *United States v. Julian*, 469 F.2d 371, 376 (10th Cir. 1972); *United States v. Bennett*, 460 F.2d 872 (D.C. Cir. 1972); *United States v. Bohle*, 445 F.2d 54, 66-67 (7th Cir. 1971).

The Solicitor General's reliance on *Hoffa v. United States*, 385 U.S. 293, 303-04 (1966); is misplaced. Brief for the United States, P. 26. Because Hoffa was neither in custody nor under court order to talk to the government informant, the Self-Incrimination Clause was not applicable.

terials and Cases 910-11 (1969). Courts have recognized that probationers often assume that statements made to their probation officers, including statements about criminal conduct, are in some way confidential. *Marrs v. State*, 452 A.2d 992, 994 (Md.App. 1982); *People v. Alston*, 431 N.Y.S.2d 82, 84 (App.Div. 1980). See, Brief for the United States, P. 27 n. 16.[12] In this case, the probation officer exploited her role as a counselor in order to obtain incriminatory statements. The misleading nature of the probation officer's conduct could not have occurred if the questioning had been done in the presence of impartial observers or if the respondent had been given some advance opportunity to talk to an attorney.

Another menacing interrogation technique described in *Miranda* concerned what an interrogator should do if a

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[12]It is not necessary for the Court to decide in this case whether all court ordered probation interviews are so non-adversarial in nature that some kind of *Miranda* warnings are required before statements made during such interviews can be used in a criminal trial.

It has long been established that a person may invoke the privilege against self-incrimination at a criminal trial without having previously asserted it if the government "obtained [the incriminating statements] by any direct or implied promises, however slight. . . ." *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 347 (1963), quoting, *Bram v. United States*, 168 U.S. 532, 542-43 (1897). In this case, the probation officer told the respondent that the purpose of their meeting was "[t]o further discuss a treatment plan for the *remainder of your probation* . . ." Pet.App. C36 (Emphasis added). At the time of the meeting, the respondent had two years remaining on his probation. Pet.App. C31. The penalty for rape-murder in Minnesota is mandatory imprisonment. Minn. Stat. §609.185(2) (1974). By telling the respondent that the purpose of the meeting was to determine a treatment plan for the remainder of his probation, the probation officer implicitly represented that a new criminal prosecution would not result from discussing the murder. One does not participate in a treatment program as a condition of probation while serving time in prison.

person suspected of a crime indicates a desire to speak to an attorney. The police manuals referred to in *Miranda* suggest that the interrogator say he is only looking for the truth, and that if one tells the truth, then there is no need for an attorney. *Miranda*, 384 U.S. at 454. In this case, after the respondent said that he felt like calling an attorney, the probation officer told him that he would have to contact an attorney outside the probation office because now she wanted to talk about treatment. Pet.App. C16. The message communicated was that the respondent did not need an attorney but only needed to speak the truth.

By telling the respondent that he could not call a lawyer, the probation officer effectively prohibited the respondent from exercising his privilege against self-incrimination. "The assertion of a testimonial privilege . . . often depends upon legal advice from someone who is trained and skilled in the subject matter. . . ." *Maness v. Meyers*, 419 U.S. 449, 466 (1975)." There is no legally significant distinction between a probation officer telling a probationer that he cannot call a lawyer and a judge telling a witness that he cannot assert the privilege against self-incrimination. In either case, any resulting statement constitutes compelled testimony in its "most pristine form." *New Jersey v. Portash*, 440 U.S. 450, 459 (1979).

This case contains all the essential elements which formed the basis of the Court's decision in *Miranda*. A government official deliberately used the government's compulsory processes to elicit incriminatory information from an individual in the absence of impartial ob-

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[13]One does not forfeit his legal rights when acting in reliance upon false legal advice given by a government official. *Van Moltke v. Gillis*, 332 U.S. 708, 727 (1948) (Frankfurter, J., concurring).

servers and without providing any opportunity for the individual to consult with a lawyer. This Court has never required an individual to assert the privilege under similar circumstances in order to invoke the privilege at a subsequent criminal trial.

E. The Decision By The Minnesota Supreme Court Will Serve The Best Interests Of The Probation System Without Undermining The Legitimate Interests Of Law Enforcement.

The Minnesota Supreme Court decision does not interfere with the proper functioning of law enforcement agencies. If law enforcement agencies need to use the court's compulsory processes to investigate criminal conduct, then the grand jury system is available. Law enforcement agencies should not and cannot look to the probation system to gather evidence for criminal trials. *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975). Compare, *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir. 1975).[14]

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[14]The Administrative Office of the United States Courts has the following guidelines with respect to disclosures by probation officers to law enforcement agencies:

> Generally, disclosure to [law enforcement] agencies should only be with respect to providing identifying information from the record, such as an individual's location, handwriting exemplars, or information relating to possible risk law enforcement officers may incur when investigating the individual in question. *The inquiring law enforcement agency should clearly understand the disclosure of information is for investigatory purposes, not evidentiary.*
>
> Self-incriminating statements made in the routine course of probation business, made without "Miranda" warnings may be used in probation revocation hearings. *The focus should be on obtaining this information for the probation revocation hearing rather than for further criminal prosecution.* If evidence of further criminal

The Solicitor General argues that the Minnesota Supreme Court decision undermines the trust relationship which is a necessary part of the probation system. It is suggested that the court's decision will encourage probation officers to give unnecessary *Miranda* warnings which would "discourag[e] probationers from viewing probation officers as counselors with whom they can discuss their problems. . . ." Brief for the United States, P. 27. From there, the Solicitor General argues that the Fifth Amendment rights of probationers should be limited. With limited Fifth Amendment rights, probationers would be more likely to make incriminatory statements to their probation officers which could later be used against them in criminal trials. The institutional needs of the probation system are supposed to justify that result. Brief for the United States, P. 28-32.

The Minnesota Supreme Court decision will not result in probation officers giving probationers unnecessary *Miranda* warnings. When a probation officer receives information indicating that a probationer has engaged in other criminal conduct, the probation officer can give that information to the appropriate law enforcement authorities.[18] The matter can then be handled like any other crimi-

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activity exists, with the permission of the court, an independent investigation may be requested of a law enforcement agency. If general background information is needed by a law enforcement agency it should be given to them with the consent of the probationer. Volume X, Guide to Judiciary Policies and Procedures, P. 4-34, 35 (Emphasis added).

[18]The only exception to that would be in a case such as this where the probation officer would have violated federal confidentiality laws had she gone to the police with the information she received from Alpha House. The counselors at Alpha House may disclose the content of a probationer's statements made during treatment to a probation officer

nal investigation. Under the federal probation system and under the probation system envisioned by the Minnesota Supreme Court, when a probation officer asks a probationer questions about other criminal conduct, the purpose of those questions will only be to determine whether to further regulate or revoke probation. Brief for the United States, P. 27 n. 16. *Miranda* warnings are not required for that purpose. Pet.App. A7-8; Note 14, *supra*. It will only be in those rare cases when a probation officer wants to preserve the evidentiary value of a probationer's statements that the probation officer must advise a probationer of the privilege against self-incrimination.[16]

This Court has held that the institutional needs of a prison system justify reasonable restrictions on some constitutional rights of prisoners. *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979); *Jones v. North Carolina Prisoner's Labor Union*, 433 U.S. 119, 125 (1977); *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Price v. Johnston*, 334 U.S. 266, 285 (1948). But cf., *Mathis v. United States*, 391 U.S. 1 (1968). The institutional needs of a probation system are distinguishable from the institutional needs of a prison system.

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but cannot disclose such statements to the police. A probation officer can use those statements to regulate or revoke probation but a probation officer cannot use those statements to "initiate or substantiate" a criminal investigation. 21 U.S.C. §1175; 42 U.S.C. §4582; 42 C.F.R. §§2.39, 2.63. See, Pet.App. B15-16. In order for treatment facilities like Alpha House to be effective, patients must be able to speak freely and without fear of reprisal. Congress has determined that it is more important to have patients speak freely during treatment than it is to use treatment facilities as sources for criminal investigations.

[16]After making that advisory, a probation officer could also advise a probationer that cooperation with the authorities may lead to more favorable treatment. A statement made for that reason by a probationer who knows his legal rights is not inadmissible at a criminal trial. *Fare v. Michael C.*, 442 U.S. 707, 727 (1979).

There is no dispute that a necessary and proper role for a probation officer is to be a counselor to the probationer. *Gagnon v. Scarpelli*, 411 U.S. 778, 783-85 (1973). In order for the probation officer to fulfill the role of a counselor, the probation system must have at its foundation a trust relationship between the probationer and the probation officer. Mangrum, *The Humanity of Probation Officers*, 36 Fed.Prob. 47 (June 1972). If a probation officer exploits the role of a counselor to obtain incriminating statements which are used at a criminal trial, then the probation officer undermines the foundation of trust in the probation system. In *People v. Parker*, 82 A.D.2d 661, 667 (App.Div. 1981), aff'd., 57 N.Y.2d 815 (1982), a case decided in the context of the parole system, the court said:

> [T]he use of statements made by a parolee to his parole officer as evidence in a criminal trial against the parolee disrupts and destroys the confidence and trust which must inevitably inhere in the relations created by the parole system. The parole system presupposes the rehabilitation of the offender and must be built on the frank communication of advice and information between parolee and his supervisor, and that relationship will be damaged beyond repair if the indispensible pillar of candid exchange is undermined.

A probation officer is an official representative of the judiciary. The judicial branch of government has as its most important function the protection of constitutional rights. The holding of the Minnesota Supreme Court protects the integrity of the judicial branch of government and the trust relationship essential to the probation system.

II.

A PROBATIONER INVOKES THE PRIVILEGE AGAINST SELF-INCRIMINATION BY TELLING HIS PROBATION OFFICER THAT HE WANTS TO CALL AN ATTORNEY WHEN THE PROBATION OFFICER IS ALREADY ON NOTICE THAT THE INFORMATION SHE SEEKS TO ELICIT FROM THE PROBATIONER WILL INCRIMINATE THE PROBATIONER WITH RESPECT TO A NEW CRIMINAL OFFENSE.

The Self-Incrimination Clause protects probationers against independent criminal prosecutions to the same extent as any other person. Cf. *Mathis v. United States*, 391 U.S. 1 (1968). When an individual pleads guilty to a criminal offense, he waives the privilege only with respect to that offense. *United States v. Pierce*, 561 F.2d 735, 738 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978); *United States v. Sanchez*, 459 F.2d 100, 103 (2d Cir.), cert. denied, 409 U.S. 684 (1972). An individual on probation may legitimately assert the privilege in order to protect himself against new criminal prosecutions. Cf. *Roberts v. United States*, 445 U.S. 552, 559 (1980).[17]

[17]Recognition of this fundamental principle will not cause the demise of the probation system. A probation officer can compel nonincriminatory information from a probationer. Frivolous assertions of the privilege need not be honored by a probation officer and can be punished like any other contemptuous conduct. While the Court has not yet ruled on this issue, it may be permissible to draw an adverse inference at a revocation hearing when a probationer legitimately asserts the privilege. See, *Baxter v. Palmigiano*, 425 U.S. 308, 316-20 (1976). This would satisfy the concerns expressed by Judge Frankel in *United States v. Manfredonia*, 341 F.Supp. 790, 794-95 (S.D.N.Y.), aff'd., 459 F.2d 1392 (2d Cir.), cert. denied, 409 U.S. 851 (1972). See, Brief for the United States, P.29-30 n.18.

The Self-Incrimination Clause limits the power of the government to use its compulsory processes to obtain testimony from an individual when the government has notice of two things: (1) that the testimony it seeks will incriminate the individual; and (2) that the individual objects to the government seeking that testimony. *Garner v. United States*, 424 U.S. 648, 655 (1976); *Emspak v. United States*, 349 U.S. 190, 203 (1955) (Harlan, J., dissenting). Sufficient notice is the key feature to an assertion of the privilege. *Quinn v. United States*, 349 U.S. 155, 164 (1955).[18]

A person need not have the knowledge or the vocabulary of a lawyer in order to invoke the protections of the Self-Incrimination Clause. The privilege is asserted "[i]f an *objection* to a question is made *in any language* that a [government official] may reasonably be expected to understand as an attempt to invoke the privilege. . . ." *Quinn*, 349 U.S. at 162-63 (Emphasis added). See, *Miranda*, 384 U.S. at 444-45 (can assert the privilege "in any manner"). *United States v. Goodwin*, 470 F.2d 893, 902 (5th Cir.), cert. denied, 411 U.S. 969 (1972) ("even the most feeble attempt to claim a Fifth Amendment privilege must be recognized.") In determining whether the privilege

[18]The trial court fundamentally erred by discussing the respondent's request for a lawyer solely as a part of a voluntariness analysis. Pet.App. B13-14. In order to assert the privilege, it is not necessary to engage the government in a battle of wills. The respondent testified that after he asked to call a lawyer, the probation officer "seemed . . . kind of angry and frustrated." Pet.App. C26. It would be unrealistic to expect the respondent to further persist in asserting his rights. A probationer perceives his freedom as being dependent upon having a good relationship with his probation officer. If the respondent had continued to ask for a lawyer, then, from the respondent's perspective, he would have impaired that relationship and jeopardized his freedom.

has been asserted, the focus should be on the words uttered by the individual and not on the subjective interpretation given to those words by the government official. *Quinn*, 349 U.S. at 162-63; *White v. Finkbeiner*, 611 F.2d 186, 190 (7th Cir. 1979), cert. denied, 424 U.S. 970 (1980), remanded other grds., —— U.S. ——, 101 S.Ct. 3000 (1981). But see, Pet.App. B5. If the words uttered by the individual are equivocal or ambiguous, then it is the duty of the government official to clarify whether the individual is attempting to assert the privilege. *Quinn*, 349 U.S. at 164; *Thompson v. Wainwright*, 601 F.2d 768 (5th Cir. 1979); *Nash v. Estelle*, 597 F.2d 513 (5th Cir.), cert. denied, 444 U.S. 981 (1979).

A request for a lawyer during custodial interrogation is *per se* an invocation of the privilege against self-incrimination. *Fare v. Michael C.*, 442 U.S. 707, 719 (1979). The reason for this "rigid rule" is that "the lawyer is the one person to whom society as a whole looks as the protector of . . . legal rights . . ." *Id.* In any proceeding involving the government's compulsory processes, a lawyer's advice is "an integral part of the protection accorded . . . by the Fifth Amendment." *Maness v. Meyers*, 419 U.S. 449, 468 (1975). A government official who has the power to compel testimony cannot arbitrarily deny an individual's request to consult with a lawyer. *Id.* at 472 (Stewart, J., concurring); See, *United States v. Mandujano*, 425 U.S. 564, 582 (1976) (Burger, C.J., plurality).

In this case the probation officer had advance knowledge that the answers to her questions about the murder would incriminate the respondent. She also knew that the respondent wanted to call a lawyer before discussing the

murder.[19] At that point, the notice requirements of the Self-Incrimination Clause were satisfied. The probation officer's subsequent interrogation exceeded the limits of her constitutional authority.

CONCLUSION

The judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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[19]It was sufficient notice for the respondent to say that he "felt" like calling an attorney. *Maglio v. Jago*, 580 F.2d 202, 203 (6th Cir. 1978) ("maybe I should have an attorney"); *United States v. Prestigiacomo*, 504 F.Supp. 681, 682 (E.D.N.Y. 1981) ("maybe it would be a good idea to have a lawyer"); *Wentela v. State*, 290 N.W.2d 312, 316 (Wisc. 1980) ("I think I need an attorney"); *People v. Tranbert*, 608 P.2d 342, 346 (Colo. 1980) ("I think I need to see an attorney"); *State v. Blakney*, 605 P.2d 1093, 1097 (Mont. 1979) ("Maybe I should have an attorney"). See Note 9, *supra*.